

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant	: Andrew Schydloowsky	Art Unit	: 3693
Serial No.	: 10/697,767	Examiner	: Richard C. Weisberger
Filed	: October 30, 2003	Conf. No.	: 8887
Title	: CUSTOM FOOD		

**Mail Stop Appeal Brief - Patents**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**REPLY BRIEF**

Pursuant to 37 C.F.R. § 41.41, Applicant maintains the appeal and responds to the Examiner's Answer mailed on November 3, 2008.

**Rejections under 35 U.S.C. § 112, second paragraph**

The Examiner has stated in all previous correspondence that the claims are indefinite because the term powder is indefinite in scope. In the Examiner's Answer mailed November 3, 2008, however, the Examiner argues that "it is the examiner's position that in view of the markush group that the term powder is more a term of degree (e.g., small or large) than a term of pre-defined scope." Page 2. Applicant is not clear what the Examiner means by his argument that the term powder is "more a term of degree than a term of pre-defined scope." The Examiner has not previously made any reference to the Markush group used in the claims, nor provided Applicant with any reasoning for why the use of such a claim construction should make the term "powder" any more or less definite. As has been argued previously, when interpreted based on the present specification and that which would be understood by one of ordinary skill in the art, the term "powder" refers to a substance consisting of ground or finely divided or dispersed solid particles. See Appeal Brief Exhibits A-C. This understanding applies regardless of whether the powder is composed of a single component or any combination of those provided in the Markush group.

Moreover, merely because the term "powder" is construed by the Examiner to be "more a term of degree than a term of pre-defined scope" does not render the term indefinite. "That some

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claim language may not be precise, however, does not automatically render a claim invalid.” *Seattle Box Co., Inc. v. Industrial Crating & Packing, Inc.*, 731 F.2d 818 (Fed. Circ. 1984). When a term of degree is used in the claims, the standard requires that the Examiner determine “whether the patent’s specification provides some standard for measuring that degree,” and whether a person having ordinary skill in the art “would understand what is claimed when the claim is read in light of the specification.” *Id.* The specification provides a standard for measuring the degree of the term powder. See, for example, that the term “powder” is indicated in the specification to be one example of a “form” of a base (the dietary supplement here); the other possible forms include solid, semi-solid, and liquid. Specification at page 4, lines 17-18. To indicate that the base can be in “powder” form as one form in addition to solid or liquid forms is consistent with a definition of powder which indicates that powder particles behave intermediately between that of a solid and a liquid (see Appeal Brief Evidence Exhibit C entry [www.unistates.com/rt/explained/glossary/rmtglossarypq.html](http://www.unistates.com/rt/explained/glossary/rmtglossarypq.html)). Accordingly, if the term powder is construed to be a “term of degree,” in light of the specification a person having ordinary skill in the art would understand the standard for measuring the degree and the use of the term within the claims.

The Examiner also newly argues that “there is nothing in the specification that further defines this protein, peptide, amino acid, carbohydrate, electrolyte, and/or an herb powder.” Examiner’s Answer of November 3, 2008 at page 2. Applicant respectfully asserts that such a further definition is not required given the understanding of one of ordinary skill in the art and the disclosure of the specification. As discussed above and in the Appeal Brief, the term powder is clearly defined in the specification and is within the understanding of a person having ordinary skill in the art. No other definition is required to understand Applicant’s invention.

For these reasons and the reasons stated in the Appeal Brief, the Board is requested to reverse the rejections for indefiniteness.

#### **Rejections under 35 U.S.C. § 102(b)**

The Examiner argues that Applicant has not provided any support for the meanings of the terms “dietary supplement” and “powder,” but instead has only indicated that such terms do not

encompass the ready-to-eat cereals of Morrisette *et al.* U.S. Publication No. 2002/0150658 (hereinafter, "Morrisette"). Examiner's Answer of November 3, 2008 at page 4. Applicant has, however, argued and presented evidence that these terms do in fact have an ordinary meaning to those of ordinary skill in the art to which the present invention belongs. See Appeal Brief Exhibits A-C and E. Moreover, Applicant has also indicated that the term "dietary supplement" is defined in the specification to include, for example, "muscle building or protein powder." The use of the term in the specification is clearly consistent with the use of the term in the art and within the previously provided definitions. In either case, however, the term does not include conventional food products. Accordingly, the term "ready-to-eat cereal" as used in the Morrisette reference plainly does not fall within the ordinary meaning of either the term "dietary supplement" or "powder".

The Examiner also newly argues that Morrisette refers to a genus of "ready-to-eat cereals" and that "[c]learly, the genus term of ready to eat cereals includes forms that read on species that includes protein/carbohydrate powders, such as baby hot rice cereals." The Examiner is not only recharacterizing, but *mischaracterizing* the reference. Nowhere in Morrisette does it refer to a genus of ready-to-eat cereals, and in particular, no reference is made to baby hot rice cereals. Applicants further assert that even if one were to consider the reference to "ready-to-eat cereals" to be that of a genus of compositions, given the example provided in Morrisette, e.g., that of whole wheat flakes, such a genus would not be understood by a person having ordinary skill in the art to include baby hot rice cereal. Morrisette paragraph [0010]. Baby hot rice cereals are not "ready-to-eat" in the same sense as whole wheat flakes as the former requires the addition of water or milk before the product is in fact "ready-to-eat." Finally, although it may be true that ready-to-eat cereals contain proteins and carbohydrates, the final product is neither a dietary supplement nor a powder as required by the claims and as would be understood by a person having ordinary skill in the art. Accordingly, the Examiner is setting forth new arguments that are not consistent with the reference provided, that are not consistent with his previous rejections, and that are not appropriate.

For these reasons and the reasons stated in the Appeal Brief, the Board is requested to reverse the rejections under 35 U.S.C. § 102(b).

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Serial No. : 10/697,767  
Filed : October 30, 2003  
Page : 4

Attorney's Docket No. 15651-0002001

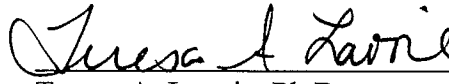
For these reasons, and the reasons stated in the Appeal Brief, Applicant submits that the final rejections should be reversed.

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Respectfully submitted,

Date: \_\_\_\_\_

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